A DECISION MAKER'S GUIDE TO JUDICIAL REVIEW

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You are the person who issues drivers' licenses in Prince George or you are an appointee sitting on a hearing panel of the Industrial Relations Council. While your jobs may involve different levels of expertise in legal matters, you both have one thing in common: you must adhere to the principles of administrative law when you are making a decision. If you do not, you risk the possibility that your actions will be reviewed and perhaps changed by a court. In that sense, you always have a judge looking over your shoulder.

Judicial review of administrative decisions is not unusual. It most often occurs when the person or persons who are affected by a decision disagree with it. Under the authority of legislation known as the **Judicial Review Procedure Act**, they can ask the court to decide whether a decision was arrived at properly.

The judge may do a number of things: quash your decision, make a declaration concerning the legal rights and duties of the people involved, send the matter back to you for reconsideration (with or without a set of directions from the court), order you to perform a duty or action, or order you to refrain from performing a duty or prohibit you from taking an action.

Each of these options has a legal label, but what they are called is not as important to you as understanding why a court would use them. That is what this booklet is for — to guide you through the labyrinth of administrative law and judicial review. It will tell you what you should do in order to avoid having your decision challenged in the courts. What the following does not do is take the place of formal legal advice. You can, however, use this information to tell you when you should be seeking further assistance from a lawyer.

WHO MAY BE REVIEWED

Those who exercise a power granted to them by a provincial law may have their decisions examined through judicial review. For example, the person issuing drivers' licenses is given the power to do so through the **Motor Vehicle Act** and the Industrial Relations Council panel member is likewise given the power to make decisions through the **Industrial Relations Act**.

The following illustrates the kinds of questions you should be asking yourself about the decisions you are making.

A. Have you got the powers to do what you want to do? Are you merely adopting a particular statutory interpretation which happens to suit what you want to do?

This amounts to the basics of judicial review. To find your answer, you will normally go to the wording of the legislation that applies to the particular decision that you have to make. The court will go through the same process if it is being asked to review your decision. Sometimes such interpretation is a simple task and the entire case can be decided on that basis. Both sides will probably put forward to the judge competing arguments about the correct meaning of the words. More often than not, however, judicial review will involve more than looking at what the words of the statute actually say. The courts have developed several different approaches they use to determine whether the decision in question has been arrived at properly.

B. Are you exercising the power for the purpose for which it was given?

Sometimes a court will determine that the authority's decision is not correct because of its illegality. Even where a statute appears to confer very wide discretion the courts will consider that it has not been properly exercised if it is outside the purpose or spirit of the Act. In deciding what the purpose or spirit is, the courts will look to the Act as a whole.

Example:

Under the **Alcoholic Liquor Act**, 1941, a Quebec liquor commission was set up to issue, cancel and renew liquor licenses for the sale and distribution of alcoholic beverages. A restaurant owner in Montreal, who had been licensed for 34 years, suddenly had his license cancelled. He later found out that the Premier of the province had instigated the action because the restaurateur was a member of Jehovah's Witnesses and he had been providing bail for other members who had been arrested for contravening city bylaws respecting distribution of printed materials. The Supreme Court of Canada held that the cancellation of the man's license "upon this ground alone therefore was without legal justification. Moreover, the religious beliefs of the appellant and his perfectly legal activities as a bondsman had nothing to do with the object and purposes of the **Alcoholic Liquor Act**, and the powers and responsibilities of the Manager of the Quebec Liquor Commission are confined to the

administration and enforcement of the provisions of the said Act." The court also held that it was an actionable wrong for the Premier to procure the cancellation of the license by the commission on these grounds and an allegation of good faith in making the decision will not be a defence when there is no authority in the legislation allowing the Premier to take such an action.
Roncarelli v. Duplessis (1959) 16 D.L.R. (2d) 689 (S.C.C.).

Example:

In Britain, the **Wireless Telegraphy Act**, 1949, appeared to give the Minister (called the "Home Secretary"), the widest possible discretion to revoke TV licenses. In January, the Home Office announced an increase in the license fee to take effect in April. An applicant took out a new license in March before the higher rate took effect. The Court of Appeal in Britain held that the Minister could not exercise his powers of revocation in order to prevent the applicant from taking out a year's license at the lower rate. The Court of Appeal held that the use of the power of revocation was for a purpose not authorized by Parliament in the Act.
Congreve v. Home Office (1976) Q.B. 629 (Q.B. Div.).

C. *Are you acting for the right reasons? Have you taken into account all relevant information and excluded irrelevant considerations? As well, though you may not need to spell out the reasons for your decision, if you do, are the reasons which you give the correct ones?*

While these questions are somewhat tied into the above discussion on illegality, the answers also involve consideration of whether a decision is irrational or given without reasons. The courts have held that a decision made by people like you must be reasonable. While they demand reasonableness, they usually try to step into the shoes of the administrative decision-maker in trying to decide what is reasonable for him instead of imposing their own opinion. Though the courts will rarely substitute their own decision, judges often use words and phrases like "fairness", "reasonableness", "legitimate expectation", "illegality" and "bias" when they review administrative actions. This allows the courts a considerable degree of flexibility in deciding a particular case. Unfortunately for you, it makes it difficult to be certain in advance how the court will decide.

Example:

The Law Society of British Columbia has instituted a mandatory insurance scheme for all lawyers who want to practise in the province. One lawyer went to court saying that the fee was too high and was based on an insurance scheme that the society, by law, was not allowed to enter into. The challenge was whether the decision to

make the scheme mandatory was unreasonable. The court ruled that it was not. In determining the standard of reasonableness the court stated that it "is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come, or so unreasonable that it might almost be described as being done in bad faith....This is a case of different views, both honestly and sincerely held. However, the legislature has authorized (the Law Society), to decide between or reconcile these views. This is not a case of the improper abuse of power of or a decision so unreasonable that it can almost be equated to bad faith."
Beltz v. Law Society of B.C., (1987) 7 B.C.L.R. (2d) 353 (B.C.S.C.).

Example:

A police officer appealed findings that he had violated the force's discipline code to both the police board and the police commission. He then asked the court to judicially review the commission's decision arguing that, among other things, there was no evidence upon which the decision could be made. He said all the disciplinary bodies had to go on were transcripts of telephone conversations from which they could draw inferences. While the court agreed that any decision made by an administrative body without evidence would not be upheld by a court on judicial review, this would only apply if the "court is satisfied that there is a total absence of evidence." The court said in this case there was "some evidence" and not just mere speculation upon which the decision to take disciplinary action was founded.
Wylie v. B.C. Police Commission
(1988) 18 B.C.L.R. (2d) 192 (B.C.C.A.).

Example:

While there may be no general obligation on you to give reasons for your decision, if you do not, the court may make its own conclusions on the facts. The city council in Vancouver had the statutory power to grant or refuse business licenses, and the legislation stated that the council could make its decision without giving reasons. The operator of a hotel was refused a renewal of his license, and even though the council stated that its reasons concerned the poor management of the hotel, the court still decided the legislation allowed council " to decline to give reasons and that ... is contrary to fundamental justice. How can a citizen properly challenge council's decision if no reasons are given."
D & H Holdings Ltd. v. City of Vancouver,
(1985) 15 Admin. L.R. 209 (B.C.S.C.).

If you do give reasons, you should ensure that those reasons are proper (that they are within your area of discretion). You should show that you have considered all the issues and that your reasons will "hold up" under close scrutiny.

D. Have you heard and considered the points of view of people likely to be affected by your decision? Have they been put in the picture sufficiently so that they have a fair opportunity to make representations?

This involves consideration of whether or not you have followed the proper procedure in making your decision. The question really amounts to whether you have given the person or body affected by your decision a fair hearing which usually means that you should afford them a full opportunity to "make their case" to you so that you know all the relevant material before you make your decision.

The degree of formality required does not fall into different categories. It operates more like a spectrum moving from a simple administrative hearing (which could be a conversation between the person who grants a drivers' license and the person who is seeking one) to a hearing which operates more like a court case (as in matters heard before panels of the Industrial Relations Council). Generally, as you move along the spectrum, you will be expected to increase the degree of procedural fairness and with it the formality of the hearing.

In some circumstances, the legislation will not require you to hold an oral hearing, but depending on the circumstances, you should be prepared to give the people affected a chance to make submissions to you. They should also be apprised of the "case" they have to meet.

Example:

An environmental group sought oral hearings before the Environmental Appeal Board concerning the issuance of pesticide use permits in the Queen Charlotte Islands. The board had the power to hold oral hearings, but it had decided that appeals would be decided only on the basis of written submissions. The court stated that while oral hearings are not always required, in this case they were because the matter was of obvious importance and it "would be fundamentally wrong and against the rules of natural justice to hear and determine matters of such public importance without holding public hearings in which oral evidence and representations can be heard."
Islands Protection Society v. Environmental Appeal Board et al. (1986) 8 B.C.L.R. (2d) 30 (B.C.S.C.).

Example:

A man sought judicial review of a decision by the Superintendent of Motor Vehicles to suspend his drivers' license after the man accumulated 41 penalty points against his license. He argued that since the legislation allowed the superintendent to take such action "with or without a hearing", the law contravened the **Charter of Rights and Freedoms**. The court referred to the "spectrum" of the duty of fairness in ruling that an oral hearing was not required in this instance.

"Thousands of administrative decisions are made daily impinging on the rights of the individual. It would be folly to suppose that the principles of fundamental justice demand a full oral hearing in every case ... the key will always be whether the decision maker has acted fairly in dealing with the citizen's rights. In some cases only a full, formal, oral hearing will suffice to comply with the duty of fairness; in other cases the duty will not demand so much. At a minimum, however, the principles will always require some kind of hearing, even if it only involves the most rudimentary ability to respond to and have notice of the case against you." In this case the court ruled that the superintendent was not bound to hold a formal, oral hearing and since the driver had been warned about the possibility of a license suspension a number of times and had been given an opportunity to respond, he was dealt with fairly.
Hundal v. Superintendent of Motor Vehicles
(1985) 64 B.C.L.R. 273 (B.C.C.A.).

The formal oral hearing referred to above may, at its most extreme, require that a party have a right to a lawyer, and/or the right to cross-examine witnesses.

E. Have you allowed in your timetable sufficient time for consultation and representations?

F. Have you made up your mind in advance or given that impression, eg. have you merely blindly followed departmental policy without considering the circumstances of the particular case? If you propose to follow a general policy in a particular case should you make it clear when communicating your decision that you have carefully considered the individual application to see whether it merited an exception being made?

This is legally known as the potential problem of "fettering of discretion" that you have as an administrative decision-maker. The courts will usually require you not to make decisions in a vacuum and to consider the merits of each case.

Example:

An applicant wanted to open a pub on a site close to a highway. When the deputy-general manager of the Liquor Control and Licensing Branch refused the application, the applicant appealed to the minister. The deputy minister wrote a letter to the applicant refusing the pre-clearance. She based her decision almost entirely on a branch regulation that disallowed pubs near a highway unless the branch gave its approval. The applicant went to court arguing that the deputy minister had fettered her discretion by refusing his application not on the basis of the pub's distance from the roadway, but because of branch policy to consistently refuse applications for pubs located near the highway. The court agreed saying that by applying the policy, she "was not free to determine if this was a situation where approval should be given....".
Starlight Drive-In (1978) Ltd. v. Hewitt
(1984) 57 B.C.L.R. 250 (B.C.S.C.).

G. Have you or anyone involved in making the decision any conflicting interest which might lead someone to suppose that there is bias?

Accusations of bias on the part of the decision-maker can infrequently lead to even more serious allegations of fraud or collusion. What matters here is the appearance of bias. Appearances of this nature can be inferred from factors such as whether you are related to the applicant, or whether you have any financial stake in the outcome of a matter. Sometimes bias can be cited in cases such as those under section "F", where the decision-maker has a policy and may be so close-minded as to appear to be biased in favor of that policy and against anything which does not fit within it. As well, taking account of irrelevant considerations may lend an appearance of bias.

H. Are there any grounds for thinking you might not be acting fairly? Have your words or actions in the past led anyone to suppose that your current actions or intentions are different?

You should think about whether you have adopted a course of conduct over time in dealing with parties which would lead them to believe that they can legitimately expect that your actions will continue to be consistent.

Example:

A cattle company in the interior had a licence to divert water from the Nicola River for irrigation. It had been doing so for seventy-five years. But it had also been diverting additional water to a lake without an additional licence for the same period of time. It was only after the company made repairs along the diversion line that an

engineer for the Ministry of Environment and Parks opposed his right to take water from the river to sustain the lake. The court held that the company had been acting unlawfully for seventy-five years, but it said that since the government had "stood by and permitted the unlawful diversion" the company had a reasonable expectation that the ministry "would not after 75 years stop the diversion" without giving the company notice of its plans and a chance for the company to make its case known to ministry officials. The judge ordered that the water flow to the lake should continue at least until the company had an opportunity to be heard.
Douglas Lake Cattle Company Ltd. v.
Minister of Environment and Parks,
Unreported, B.C.S.C., March 21, 1988.

I. Has the decision-making been wrongly delegated?

Usually, there are laws or regulations in place which give you the lawful power to make decisions. Often, that legislation will refer to the "Minister" as the one who is making the decisions when in fact it will be an official who will be handling matters. That is a practice which is acceptable to our courts. But you must be careful to avoid delegating any decision-making powers to an outside body which merely rubber-stamps decisions or delegating it to other departments or officials who are not empowered to be making the decisions that belong in your realm.

Example:

The government attempted to institute a wolf-kill program in 1988. The regional manager of the Ministry of Environment and Parks issued the permit to two employees of the Ministry purporting to authorize them to hunt wolves. A group of environmentalists challenged the legality of the permit in court, saying the authority to issue it had been improperly sub-delegated. The court ruled that the regional manager only had the authority to issue this particular permit if the Cabinet had created a regulation delegating that power to him. But the judge went further stating that the regulation had to contain criteria and/or guidelines for the regional manager to follow when deciding whether he could issue the permit. Otherwise, the official was being given far too wide a discretion and thus an improper sub-delegation of power from the cabinet. The permit was ruled invalid.
Western Canada Wilderness Committee v. Bruce Strachan
(1988) 25 B.C.L.R. 93 (B.C.S.C.).

J. Do you propose to act in a way which a court may regard as abusing your power or generally so unreasonable that it is likely to find against you?

The case of **Roncarelli v. Duplessis**, set out above, is the clearest Canadian example of the abuse of power. It is difficult to say how far a court will go in finding an abuse of power, but it is clear that when the court is looking at the potential abuse, it may not only consider the way the decision was reached, but whether the decision itself is right or wrong. Usually, courts are reluctant to substitute their view of a particular decision for that of the original decision-maker, instead holding that it is for the official or tribunal with the expertise in an area to exercise this power. There are, however, exceptions.

Example:

A taxpayer in Britain alleged that he had made an agreement with the Inland Revenue Commission that it would not pursue a particular matter against him if he withdrew a claim against the commission. Yet later, the commission decided to exact a tax from the man because it had subsequently found out more about the exact nature of the case. Though the court found that such an agreement never existed, it stated that if an agreement had been in place, it would have been an abuse of power for the Commission to reopen the matter.
Preston v. I.R.C. (1985) A.C. 835.

*K. What about the **Canadian Charter of Rights and Freedoms**?*

Tribunals exercising a statutory power of decision are being asked more frequently to apply the provisions of the **Canadian Charter of Rights and Freedoms** in making their decisions. Typically, the issue may arise in one of two ways. First, you may be asked to disregard the express words of a statute or regulation as being of no force and effect as a result of the operation of s. 52 of the **Constitution Act**, 1982, which states:

> "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect".

Example:

The **War Veterans Allowance Act** affirms the principle of equality between female and male veterans. However, the Act makes veteran's allowances payable to female veterans at age 55 and to male veterans at age 60. A male veteran applied to claim benefits provided by the Act a few weeks after having reached the age of fifty-five years and these were denied to him. He argued before the Veteran's Appeal Board that the Act discriminated against him contrary to s. 15 of the **Charter** ("Every individual is equal before and under the law and

has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on ... age ...") and that the discriminatory provision should be held inoperative. The Veteran's Appeal Board declined to do so saying that only Parliament can modify the age at which claimants, be they female or male, can receive an allowance. This decision was upheld by the Federal Court of Appeal:
Poirier v. Minister of Veteran's Affairs,
Unreported, F.C.A., March 29, 1989.

The second way in which the issue can arise is when you are asked to give a remedy which is just and appropriate pursuant to s. 24 of the **Charter**:

> "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

Such a remedy is only available if in exercising your statutory power of decision you are a court of competent jurisdiction.

Example:

The faculty association at Douglas College had negotiated a collective agreement which provided for compulsory retirement at age 65. Several instructors who were about to be retired filed a grievance alleging among other things that compulsory retirement was discriminatory contrary to s. 15 of the **Charter**. An arbitrator was appointed and Douglas College challenged his authority to apply the **Charter** arguing that he was not a "court of competent jurisdiction". The Court of Appeal held that the arbitrator was a "court of competent jurisdiction" and would have sent back to the arbitrator the question of whether compulsory retirement at age 65 violated s. 15 of the **Charter**.
Douglas/Kwantlen College Faculty Association v. Douglas College (1988) 49 D.L.R. (4th) 749.

The **Douglas College** case was appealed to the Supreme Court of Canada but no decision has been given yet. The authority of tribunals which are not Courts to apply the **Charter** is an area in which the law is both complex and unsettled. Until the Supreme Court of Canada provides guidance on this issue, it is recommended that you respond to a **Charter** argument with the following considerations in mind:

1. If the statute gives you jurisdiction over the parties and the subject matter in question and, as well, gives you the authority

to make the order or decision sought, you are a "court of competent jurisdiction" and may apply the **Charter** where it is just and appropriate to do so in making the order or decision. For example, a tribunal may have the authority to order that hearings be held in private. If a newspaper reporter wished to attend a private hearing you would have to balance the **Charter** guaranteed freedom of the press against the values to be advanced by exclusion of the public from the hearing (i.e., security of ongoing investigations, personal privacy of the parties, identification of witnesses who might be endangered, and so on).

2. If, on the other hand, you are asked to declare invalid otherwise applicable statutes or regulations because of an alleged contravention of the **Charter** you should decline to do so. The basis for the refusal is that while there may be considerable doubt as to your jurisdiction to invalidate laws by applying the **Charter**, there is no doubt that a provincial Superior Court has that jurisdiction. The Superior Courts are the only courts empowered to generally declare that a law is invalid. An administrative tribunal, if persuaded a law is invalid, may decline to apply a law.

3. You should remind the person seeking to challenge the constitutional validity or applicability of any statute or regulation or who is seeking a constitutional remedy under s. 24 of the **Charter** that he is obligated to serve notice on the Attorney General of British Columbia and the Attorney General of Canada at least 14 days before the day of argument (**Constitutional Question Act,** R.S.B.C. 1979, c. 63, s. 8).

L. Finally, you should think in common-sense terms, about whether the decision you have made is one which could be explained and readily accepted by any reasonable person who is intelligent and who understood all the circumstances of the particular case. If yours is a decision which seems to cry out for intervention by a third party to set the matter right in the interests of justice, you should probably re-examine your actions.

If you have serious doubts about any of these questions and how they relate to the particular matter before you, you should get legal advice before you commit your Minister or your ministry to a course of action.